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Supreme Court of the United States

INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; ANNE W. MURPHY, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE INDIANA FAMILY AND SOCIAL SERVICES ADMINISTRATION; GINA ECKART, IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF MENTAL HEALTH AND ADDICTION; LARRY LISAK, IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF LARUE CARTER MEMORIAL HOSPITAL, PETITIONERS,

v.

INDIANA PROTECTION AND ADVOCACY SERVICES.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the Eleventh Amendment is a bar to this suit by an independent state agency against state officials for prospective injunctive relief to remedy a violation of federal law when petitioners did not raise the Eleventh Amendment issue until briefing before the court of appeals en banc.

2. Whether the Seventh Circuit correctly decided, as a matter of first impression, that the Protection and Advocacy for Individuals with Mental Illness Act, which authorizes Protection and Advocacy Systems to access "all records" and bring lawsuits in federal court, creates a federal cause of action for Protection and Advocacy Systems to enforce their right to access records.

3. Whether the Seventh Circuit correctly decided, consistent with four other courts of appeals, that the Protection and Advocacy for Individuals with Mental Illness Act's authorization to Protection and Advocacy Systems to access "all records" does not implicitly exempt "peer review" records.

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BRIEF IN OPPOSITION

Indiana Protection and Advocacy Services respectfully submits this brief in opposition to the petition for a writ of certiorari.

STATEMENT

A. Statutory Framework

1. Federal law

In response to public reports of deplorable conditions at a New York state institution for persons with intellectual disabilities in the 1970s, Congress enacted legislation creating a federal grant program that paid States to designate entities as Protection and Advocacy Systems dedicated to protecting individuals with disabilities from abuse and neglect. *See* Developmental Disabilities Assistance and Bill of Rights Act, Pub. L. No. 94-103, § 203, 89 Stat. 486, 504 (1975) (codified as amended at 42 U.S.C. § 15001 et seq.); S. Rep. No. 93-1297 (1974), reprinted in 1974 U.S.C.C.A.N. 6373, 6408-6409.

In 1986, Congress enacted a similar statute to fund Protection and Advocacy Systems focused on protecting individuals with mental illness. *See* Protection and Advocacy for Individuals with Mental Illness Act (PAIMI Act), Pub. L. No. 99-319, 100 Stat. 478 (1986) (codified as amended at 42 U.S.C. § 10801 et seq.). In express statutory findings, Congress determined that "individuals with mental illness are vulnerable to abuse and serious injury" and that existing "State systems for monitoring compliance

with respect to the rights of individuals with mental illness vary widely and are frequently inadequate." 42 U.S.C. § 10801(a)(1), (a)(4). Congress made clear that it intended the federal funds to assist States in establishing Protection and Advocacy Systems that could engage in "activities to ensure the enforcement of the Constitution and Federal and State statutes." *Id.* § 10801(b)(2)(A).

Congress intended that a Protection and Advocacy System be independent of the State, but Congress gave States flexibility as to how to achieve that goal. Under both federal statutes, to ensure that Protection and Advocacy Systems are effective in investigating abuse or neglect in state-run (as well as private) treatment facilities, Congress provided that the Systems "shall * * * be independent of" any state agencies that provide treatment. *Id.* §§ 15043(a)(2)(G), 10805(a)(2). While a State is free to establish a Protection and Advocacy System either as a "private non-profit entity" or as a state entity, *id.* §§ 15044(a), 10805(c)(1)(B), in either situation, the Governor may appoint no more than one-third of any governing board of a Protection and Advocacy System. *Id.* § 15044(a)(2). Indiana and seven other States have established independent state agencies,[1] while the

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[1] *See* Conn Gen. Stat § 46a-7 et seq.; Ky. Rev. Stat Ann. § 31.010 et seq.; N.Y. Mental Hyg Law § 45 01 et seq.; N D. Cent Code § 25-01.03-01 et seq.; Ohio Rev. Code § 5123 60 et seq , Va. Code § 51.5-39.2A et seq. Alabama's system is established by unpublished Governor's directive.

remaining forty-two States have opted for not-for-profit corporations.

Once a State designates a private non-profit or state entity as its Protection and Advocacy System, it cannot change the nature of the System from private to public (or vice versa) absent "good cause," *id.* § 15043(a)(4)(A), and any such change can be reviewed initially by the federal government at the request of the System, *id.* § 15043(a)(4)(D), and then a federal court, *see Office of the Governor v. Department of Health & Human Servs.*, 997 F.2d 1290, 1292 (9th Cir. 1993).

In addition to authorizing advocacy on behalf of individuals, both statutes anticipate a separate protection role for the system by expressly providing that a Protection and Advocacy System "shall * * * have access" to treatment facilities and "all records." 42 U.S.C. §§ 15043(a)(2)(I), (c), 10805(a)(3), (a)(4). To enforce this right, the statutes confer authority on each system to pursue "legal, administrative, and other appropriate remedies" to ensure the protection of individuals with disabilities or mental illness who are receiving care or treatment in the State. *Id.* §§ 15043(a)(2)(A)(i), 10805(a)(1)(B). The federal statutory right to access records is not contingent on state law. To the contrary, since 1988, Protection and Advocacy Systems have been entitled to records even if "the laws of a State prohibit an eligible system from obtaining access to the records." *Id.* § 10806(b)(2)(C).

2. Indiana Law

a. Indiana established respondent and designated it as its Protection and Advocacy System in 1977. Respondent was established to "secure to the state * * * and Indiana citizens maximum benefits under the Developmentally Disabled Assistance and Bill of Rights Act (P.L. 94-103), and to this end this chapter should be liberally construed." Ind. Code § 12-28-1-1(b).

Respondent is an independent state agency. Respondent's governing commission consists of thirteen voting members, but only four of those members are appointed by the Governor. Ind. Code § 12-28-1-6(a). The remaining nine voting members are appointed by a majority of the commission members, *ibid.*, making the body self-sustaining. Two non-voting members are appointed by the state legislature from among its elected members. *Id.* § 12-28-1-6(c). Members of the commission serve fixed terms of three years. Ind. Code § 12-28-1-7(a). Under Indiana law, state officers appointed to fixed terms may only be removed "for cause and then only after a hearing on proper notice." Official Op. No. 40, 1954 Ind. Op. Att'y Gen. 146, 147 (1954). Thus, the members of respondent's governing commission may be removed from their positions by impeachment and trial by the state legislature for "crime, incapacity, or negligence," Ind. Const. art. VI, § 7; *see* Ind. Code §§ 5-8-1-1 to 5-8-1-18; or by conviction for a felony, *see* Ind. Code § 5-8-1-38.

Respondent may prosecute legal actions without involvement of the Indiana Attorney General. Respondent possesses the power to "sue and be sued" in its own name, hire outside counsel, and direct the exercise of its litigating authority. Ind. Code § 12-28-1-12(2), (4).

Further, respondent's finances are independent. The federal payments go "directly" to respondent. 42 U.S.C. § 15042(b). Respondent does not receive any appropriations from Indiana. *See* Ind. Prot. & Advocacy Servs., *Report to the Community: Priorities and Objectives for Fiscal Year 2011*, at 3-4 (Fall 2010), *available at* http://www.in.gov/ipas/files/0482-281_IMPACT-Fall10-WEB.pdf.

b. Separate from the Protection and Advocacy System, Indiana regulates the disclosure of "communications, proceedings, records, determinations, or deliberations" of a "peer review committee." Ind. Code § 34-30-15-1(f)(2). A "peer review committee" is defined as a committee that (1) is organized by a hospital or other medical facility; (2) at least half of whose members are individual professional health care providers or the governing board of a hospital; and (3) has the responsibility of evaluation of patient care rendered by professional health care providers, or evaluation of the merits of a complaint against a professional health care provider that includes a determination or recommendation concerning the complaint, and the complaint is based on the competence or professional conduct of an individual health care provider. *See id.* § 34-6-2-99(a).

While the records of a peer review committee are generally confidential under state law, there are numerous exceptions. Anything generated by the peer review committee may, upon approval by the health care facility's governing body, be reported to an independent patient safety agency. *Id.* § 34-30-15-1(e). And any "information" obtained by a peer review committee may be used by the hospital for "[l]egitimate internal business uses." *Id.* § 34-30-15-21(b). The "records" and "determinations" of a peer review committee may be disclosed to the disciplinary authority of the professional organization of which the professional health care provider is a member or the appropriate state board of registration and licensure that the peer review committee considers necessary for recommended disciplinary action. *Id.* § 34-30-15-8(a). A "determination" of a peer review committee of the hospital regarding an adverse event concerning patient care may be disclosed to the state department of health or another state agency "as part of the hospital's quality assessment and improvement program." *Id.* § 34-30-15-1(f). And any confidentiality provision may be waived in writing by the professional health care provider. *Id.* § 34-30-15-8(a).

B. Factual Background

This case originated in respondent's demand under PAIMI for various records of two persons with mental illness who died or were injured while in state custody. The first individual (described by the parties as Patient 1) died in another facility about 40 days after being admitted to Larue Memorial Hospital, a

psychiatric hospital operated by the Division of Mental Health and Addiction of the Indiana Family and Social Services Administration. Pet. App. 6a. Respondent was provided information by a staff person at Larue that led it to open an abuse and neglect investigation. Pet. App. 6a.

The second individual (Patient 2), who also resided at Larue, complained to respondent that hospital employees and police assaulted, battered, and attempted to murder him. Pet. App. 6a-7a. Patient 2 signed a release of information authorizing respondent to have access to his records. Pet. App. 7a.

In furtherance of its investigations, respondent requested the opportunity to inspect and copy four types of records, and was refused access to all four types. First, respondent requested access to Mortality Review Committee and Root Cause Analysis reports that resulted from Larue's internal investigation into the death of Patient 1. Pet. App. 6a. Petitioners refused to provide access to these reports because they were "peer review" records.

Respondent also requested a copy of Patient 1's "complete [medical] chart," Pet. App. 6a. Petitioners permitted respondent to inspect Patient 1's chart at Larue, Pet. App. 89a, but would not let respondent copy the chart, Pet. App. 6a. Petitioners stated that they would not release copies of the medical record without the consent of Patient 1's parents. Pet. App. 6a. They also refused to ask Patient 1's parents for consent. Petitioners explained that requesting

consent of the parents would "suggest to them that a state agency has found a smoking gun" in Patient 1's medical record, and would undo the "many hours" spent by the hospital social worker in "steering [the family] away from litigation." C.A. App. 40.

With regard to Patient 2, respondent sought a copy of the "investigation" Larue conducted in response to Patient 2's grievance. Pet. App. 7a. Petitioners provided a summary of the "investigation results," but did not provide copies of any underlying records. Pet. App. 7a. Respondent also requested the "incident report" created by Larue in response to the events surrounding Patient 2. Petitioners notified respondent that it would not provide a copy of the incident report "per organization policy." Pet. App. 91a; *see also* Pet. App. 91a. (stating that it was "not appropriate at any time [for respondent] to ask for a copy of the Incident Reports").

C. Proceedings Below

1. Respondent brought an action in district court seeking injunctive and declaratory relief to prevent petitioners from denying respondent access to the records at issue in violation of the PAIMI Act. Petitioners filed an answer in which they raised no affirmative defenses.

Following a stipulation of facts, the parties filed cross-motions for summary judgment. These motions joined issue on whether "peer review" records were exempt from the PAIMI Act's access requirement and whether respondent was required to get consent from

the parents of Patient 1 before accessing Patient 1's medical records. Petitioners did not argue that respondent's action was barred by the Eleventh Amendment, or question whether respondent possessed a federal cause of action to enforce the PAIMI Act.

The district court granted respondent's motion for summary judgment and denied petitioners' motion for summary judgment. Pet. App. 84a-105a. It held that PAIMI gave respondent a right to access "peer review" records, Pet. App. 93a-104a, and noted that petitioners had conceded in their brief that respondent had the right to access Patient 2's incident report, making summary judgment appropriate with respect to that report as well, Pet. App. 104a. The district court ordered petitioners to provide respondent access to those records but stayed its injunction pending disposition of the appeal. Pet. 7-8.

2. On appeal, petitioners renewed their statutory arguments that "peer review" records were exempt from the PAIMI Act's access requirement. Petitioners again conceded that Patient 2's incident report "fit[] the statutory definition of a 'record,'" Pet. C.A. Panel Br. 18, but claimed that the additional documents pertaining to Patient 2, described in their brief as "an incident panel review" and "the investigator's notes," *id.* at 3, 18, were not "records," *id.* at 18-20. Petitioners did not argue that respondent's action was barred by the Eleventh Amendment, or question whether respondent possessed a federal cause of action to enforce the PAIMI Act.

Following oral argument, the court of appeals ordered supplemental briefing on, inter alia, whether respondent had standing to assert a claim and whether PAIMI created rights enforceable in federal court by respondent. *See* C.A. Panel Order of Jan. 26, 2009. In response, petitioners argued that respondent lacked standing, either in its own right or on behalf of its clients, *see* C.A. Supp. Br. for Appellants at 1-3, and that PAIMI, as a funding statute, did not confer a private right of action on respondent to enforce respondent's right to access records. *Id.* at 3-4.

The court of appeals issued an opinion reversing the district court's grant of summary judgment. Pet. App. 74a-83a. It held that PAIMI did not create a private right of action to enforce directly the requirement that respondent receive access to "all records," and that respondent, as a state agency, could not enforce that requirement by bringing suit under 42 U.S.C. § 1983. Pet. App. 77a-80a. The court further held, without any briefing, that the Eleventh Amendment barred the suit as to the state agency defendant. As for the state official defendants, the court held that the *Ex parte Young* exception did not apply, because respondent's suit was not for solely prospective relief and also merely involved an intramural dispute within Indiana state government that did not belong in federal court. Pet. App. 80a-83a.

The en banc court granted rehearing, vacated that opinion, and ordered full briefing.

3. In their en banc brief, petitioners expressly abandoned their argument that respondent lacked standing. Petitioners also acknowledged that they were obliged to turn over the incident report for Patient 2. Six weeks later, on the day they served their en banc reply brief, petitioners gave respondent access to some documents regarding Patient 2, Pet. 9, but the particular incident report requested was never turned because petitioners could not locate it. And although they previously had argued that they did not have to turn over underlying investigative documents, petitioners claimed for the first time that no other "investigative reports were created with respect to Patient 2." Pet. App. 7a n.3; *see also* Pet. 9 n.2.

Instead, petitioners pressed only three arguments: that respondent's suit was barred by the Eleventh Amendment; that respondent lacked a federal cause of action to enforce the PAIMI Act; and that "peer review records" were exempt from the PAIMI Act's access requirement.

The en banc court affirmed the judgment of the district court against the state official petitioners and ordered the judgment vacated as to the state agency petitioner. Pet. App. 1a-37a.

The court noted that petitioners would normally have forfeited their Eleventh Amendment defense by failing to raise it prior to en banc rehearing. Pet. App. 10a. The court nonetheless elected to address the defense "[b]ecause the panel opened the door" by

sua sponte raising the immunity in its opinion. Pet. App. 10a. The court, however, rejected petitioners' claim of sovereign immunity as to the named state official defendants, holding that the suit fell squarely within the scope of *Ex parte Young*. Pet. App. 10a-18a.

The court then held that Congress, by providing that respondent "shall have access to all records" and "shall have the authority to pursue * * * legal and other appropriate remedies" had clearly conferred on respondent both a right to access records and a right of action to enforce that access directly through PAIMI. PAIMI was thus unlike the statutes at issue in cases such as *Gonzaga v. Doe*, 536 U.S. 273 (2002), which only imposed restrictions on federal funding recipients. Pet. App. 20a-28a. Additionally, in the absence of any administrative enforcement mechanism, the only other possible remedy for noncompliance by *Indiana* with PAIMI's requirements would be a funding cut-off for *respondent*, which the Court noted would be "perversely counterproductive." Pet. App. 28a-31a; *see also* Pet. App. 37a-48a (Posner, J., concurring) (writing separately "to emphasize practical considerations * * * favor[ing] recognition of IPAS's right to sue to obtain patient records").

On the merits of the proper interpretation of "all records," the court affirmed the judgment of the district court on the ground that it concurred with the four other courts of appeals to resolve the issue. Pet. App. 35a-37a.

Chief Judge Easterbrook dissented in part. He agreed with the majority that the Eleventh Amendment did not bar the action, reversing his earlier view. Pet. App. 58a. But he would have held that there was no federal right of action for respondent to access records. Pet. App. 48a-63a.

4. Petitioners sought a stay of the mandate pending the filing of a petition for writ of certiorari in this Court. That motion was denied by the court of appeals in a unanimous decision. Pet. App. 65a-71a.

The court noted that its Eleventh Amendment holding conflicted with the views of the Fourth Circuit and that "such a direct circuit split provides a reasonably promising possibility for certiorari review." Pet. App. 68a.[2]

But on the question of a private right of action "there is currently no direct circuit split." *Id.* at 69a. Indeed, the court held that its decision "appears to be the first one in which that specific question has been decided, though many other cases in circuit and district courts have assumed such a right under PAIMI." *Id.* at 68a.

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[2] A month after the court's order, this Court granted certiorari to review the Fourth Circuit's decision *See Virginia Office for Protection and Advocacy v. Stewart*, No. 09-529 (granted June 21, 2010).

Likewise, on the question of whether "peer review" records fall within the scope of PAIMI, the court noted that "all circuits are in agreement." Pet. App. 69a. With "all circuits in agreement this question does not appear to be promising for certiorari review" despite an "apparent outlier" decision by the New Hampshire Supreme Court. *Ibid.*

5. Petitioners applied to this Court for a stay of the mandate, which was denied by Justice Stevens in his capacity as Circuit Justice "for the reasons stated in [the Seventh Circuit's] order." Pet. App. 64a.

REASONS THE PETITION SHOULD BE DENIED

Petitioners seek review of an order compelling them to provide respondent access to certain documents. But petitioners provided copies of those documents to respondent on June 2, 2010, in compliance with the district court's order. Petitioners themselves stated in their unsuccessful application for a stay of that order that they now possess no remedy "as a practical matter" because "no court would be able to force anyone who has seen the [documents] to erase from their memories the information they have gleaned from the documents." Appl. for Stay of Mandate at 3, 9, No. 09-A1156 (May 27, 2010). Thus, even if this case is not technically moot (a question petitioners themselves stated was not free from doubt, *see id.* at 9), it is of little practical continuing significance.

In any event, the petition raises no issue warranting review. Although petitioners press an Eleventh Amendment question similar to that presented in *Virginia Office for Protection and Advocacy v. Stewart*, No. 09-529 (argued Dec. 1, 2010), there is no reason to hold this case pending disposition of that case. That is because petitioners waived their Eleventh Amendment claim by failing to timely raise it below and electing instead to litigate this action on the merits.

The other questions presented likewise do not warrant this Court's review. The Seventh Circuit, in a holding of first impression that is consistent with the results reached by all other courts, held that respondent has a private right of action under the Protection and Advocacy for Individuals with Mental Illness Act of 1986 to enforce its statutory right to access records. Further, consistent with each of the four courts of appeals that have addressed the issue, the Seventh Circuit properly interpreted the statutory phrase "all records" to contain no implicit exclusion for so-called "peer review" records, despite some subsequent legislative history to that effect.

I. CERTIORARI SHOULD BE DENIED ON THE FIRST QUESTION BECAUSE PETITIONERS WAIVED ANY ELEVENTH AMENDMENT IMMUNITY THEY POSSESSED

The Seventh Circuit en banc unanimously and correctly held that respondent, an independent state agency, can rely on the *Ex parte Young* doctrine to sue

state officials for prospective relief to enforce federal law without violating the Eleventh Amendment. This Court is addressing that very issue in *Virginia Office for Protection and Advocacy v. Stewart*, No. 09-529 (argued Dec. 1, 2010).

But there is no reason to hold this case pending disposition of that case. The Seventh Circuit need not have relied on *Ex parte Young* in this case because petitioners waived any immunity they possessed by failing to raise that immunity defense until their en banc brief and, instead, litigating the case on the merits.

Eleventh Amendment immunity is not an issue of subject-matter jurisdiction and thus need not be raised by a court *sua sponte*. *Wisconsin Dep't of Corr. v. Schacht*, 524 U.S. 381, 389 (1998). Rather, state sovereign immunity is a "personal privilege." *Clark v. Barnard*, 108 U.S. 436, 447 (1883). It may be waived by litigation conduct, *see Lapides v. Board of Regents*, 535 U.S. 613, 619-620 (2002), including the failure to raise it in the district court, *see Blessing v. Freestone*, 520 U.S. 329, 340 n.3 (1997); *cf. Kendall v. United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 623 (1838) ("[Personal jurisdiction] is a personal privilege which may be waived by appearance; and if advantage is to be taken of it, it must be by plea or some other mode at an early stage in the cause."). In so holding, this Court has been mindful of the inequity that results when a state official litigates on the merits in the district court, then argues on appeal that the district court never actually had jurisdiction. *Lapides*, 535

U.S. at 620-621; *cf. Schacht*, 524 U.S. at 394 (Kennedy, J., concurring).

This case is an excellent example of the waste of litigant and court resources flowing from adjudicating a belatedly-raised defense of immunity. The parties here spent considerable time compiling a factual record and briefing the merits in the district court, and the district court expended its resources to resolve the action on the merits at summary judgment. Petitioners' appeal used up further time, energy, and resources in the briefing and consideration of their merits-oriented statutory interpretation claims. Indeed, petitioners failed to brief the Eleventh Amendment issue until the case was heard en banc by the full Seventh Circuit, more than *three years* into the litigation.

Notwithstanding petitioners' failure to advance an Eleventh Amendment defense either before the district court or on appeal, the court of appeals panel chose to address the question. It should not have done so. For its part, the en banc Seventh Circuit, rather than holding the immunity defense forfeited, chose to address the defense in its own opinion solely because "the panel opened the door" by "rais[ing] the Eleventh Amendment issue." Pet. App. 10a. The Seventh Circuit ought not have condoned the waste

and unfairness resulting from petitioners' belated assertion of immunity. Nor should this Court.[3]

II. CERTIORARI SHOULD BE DENIED ON THE SECOND QUESTION PRESENTED BECAUSE THERE IS NO DIVISION IN THE COURTS AND THE COURT'S DECISION WAS CORRECT

1. Petitioners argue (Pet. 13-25) that this Court should grant review of the Seventh Circuit's holding

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[3] There is no dispute that the lower courts otherwise possessed Article III jurisdiction over this action Nonetheless, because petitioners at some points challenged respondent's Article III standing (while later conceding it), respondent notes the following. First, the failure to obtain records to which federal law arguably entitles respondent "constitutes a sufficiently distinct injury to provide standing to sue," petitioners' refusal to provide the records is the cause of that injury, and ordering petitioners to provide the records will redress that injury. *Public Citizen v. Department of Justice*, 491 U.S. 440, 449 (1989)

Second, the nature of respondent as an independent state agency suing other state officials does not alter that standing analysis because a sovereign can create agencies that are sufficiently independent that they possess the requisite adversity with other agencies even if, ultimately, the sovereign could moot the dispute by eliminating one of the agencies *See Lassen v Arizona ex rel Arizona Highway Dep't*, 385 U S. 458, 460 n.1 (1967) ("This action is in form and substance a controversy between two agencies of the State of Arizona * * * We have nonetheless concluded that this is a case with which we may properly deal. The Land Commissioner is apparently a substantially independent state officer, appointed for a term of years and removable only for cause."); *Udall v. FPC*, 387 U S. 428 (1967) (adjudicating challenge by Secretary of the Interior to Federal Power Commission decision licensing a hydroelectric dam)

that the PAIMI Act creates a federal cause of action for respondent to enforce its federal right to access records solely because, in petitioners' view, the Seventh Circuit got it wrong. Petitioners are, in fact, the ones who have it wrong. But that reason, standing alone, is no basis for granting certiorari.

The cause of action question is one of first impression in the courts of appeals, as the Seventh Circuit noted. Pet. App. 68a. That is not because the Protection and Advocacy Systems have not sued defendants in the past to enforce their right to access records under PAIMI and its predecessor, the Developmental Disabilities Act. To the contrary, Protection and Advocacy Systems have been doing so for several decades. *See, e.g., Connecticut Office of Prot. & Advocacy for Persons with Disabilities v. Hartford Board of Educ.*, 464 F.3d 229 (2d Cir. 2006) (Sotomayor, J.); *Disability Rights Wisconsin, Inc. v. State of Wisconsin Dep't of Pub. Instruction*, 463 F.3d 719 (7th Cir. 2006); *Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center for Legal Advocacy v. Hammons*, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Protection & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.); *Alabama Disabilities Advocacy Program v. J.S. Tarwater Developmental Ctr.*, 97 F.3d 492 (11th Cir. 1996); *Mississippi Prot. & Advocacy Sys., Inc. v. Cotten*, 929 F.2d 1054 (5th Cir. 1991); *Ohio Legal Rights Serv. v. Buckeye Ranch,*

Inc., 365 F. Supp. 2d 877 (S.D. Ohio 2005); *Equip for Equality, Inc. v. Ingalls Memorial Hosp.*, 292 F. Supp. 2d 1086 (N.D. Ill. 2003); *Kentucky Prot. & Advocacy Div. v. Hall*, No. 3:01CV-538, 2001 WL 34792531 (W.D. Ky. Sept. 24, 2001); *Wisconsin Coalition for Advocacy, Inc. v. Czaplewski*, 131 F. Supp. 2d 1039 (E.D. Wis. 2001); *Trautz v. Weisman*, 846 F. Supp. 1160 (S.D.N.Y. 1994).

What is unusual about this case is that (at the prodding of the appellate panel) this is one of the first cases in which a defendant has challenged the existence of a federal cause of action for a Protection and Advocacy System. Pet. App. 31a-32a. The only other case, from a district court in Hawaii, reached the same result as the Seventh Circuit. *See Hawaii Disability Rights Center v. Cheung*, 513 F. Supp. 2d 1185 (D. Haw. 2007). Further percolation is appropriate to see how other courts react to this novel argument.

Further, petitioners conceded below that respondent can enforce its right to access records against state officials under a state cause of action. Pet. App. 17a-18a n.8. Thus, it is unclear why petitioners think this issue warrants further review, as they will not be avoiding any lawsuits by respondent even if they prevail on the merits of their cause-of-action argument.

2. In any event, the Seventh Circuit was correct. It examined (Pet. App. 19a-20a, 22a-27a) the cases cited by petitioners in the petition—*Alexander v. Sandoval*, 532 U.S. 275 (2001), *Gonzaga University*

v. Doe, 536 U.S. 273 (2002), and *Brunner v. Ohio Republican Party*, 555 U.S. 5 (2008) (per curiam)—and applied their holdings to this unique federal statute. "[C]lose attention to the language and structure of the PAIMI Act shows that Congress made sufficiently clear its intention to authorize protection and advocacy systems to sue directly under the PAIMI Act to enforce their rights to access to patient records against both public and private care-givers for the mentally ill." Pet. App. 34a.

As the court of appeals explained, the PAIMI Act does not (like a normal Spending Clause statute) require the State that receives federal funds under the Developmental Disabilities Act to do anything other than "designate[ ]" an entity to be its Protection and Advocacy System. Pet. App. 28a. Once the State does that, it is federal law that gives the Protection and Advocacy System its right to sue and the right to access records—no state implementation legislation is required. Pet. App. 21a, 28a. This reading is confirmed by Section 106(b) of PAIMI, which provides that "[i]f the laws of a State prohibit an eligible system from obtaining access to the records," then the effective date of the federal law is delayed until "the date such system is no longer subject to such prohibition" *or* May 23, 1986, "whichever occurs first." 42 U.S.C. § 10806(b)(2)(C). That provision "expressly preempts any state law prohibiting such access." Pet. App. 41a (Posner, J., concurring).

The court of appeals then inquired whether these federal rights were enforceable by a Protection and

Advocacy System. They found express authorization for suit in Section 105(a) of PAIMI. That provision provides that a System "shall have the authority to pursue administrative, legal, and other appropriate remedies to ensure the protection of individuals with mental illness." 42 U.S.C. § 10805(a)(1)(B). "A suit for access to patient records," the court of appeals found, "falls squarely within [that] statutory authority." Pet. App. 21a; *see also* Pet. App. 41a (Posner, J., concurring).

Further, the court of appeals held that federal fund termination, which is often an important remedy for assuring compliance with the goals of federal spending programs, had no utility under this statute. Pet. App. 29a-30a & n.13. That is because, normally, under a Spending Clause statute the funds that are terminated are those of the entity in non-compliance, such as a school district that discriminates or a state agency that does not permit someone to register to vote. But in this case, the entity that would lose the PAIMI money, the Protection and Advocacy System, is not at fault. It is trying to comply with federal law by accessing the records. It is state officials of state agencies responsible to the Governor that are violating federal law by not providing access to those records. Pet. App. 38a (Posner, J., concurring) (respondent "is a helpless bystander to the state's thumbing its nose at the statute under which [respondent] has received federal money"). Yet those agencies are not recipients of PAIMI money and thus a threat of fund termination would not encourage their compliance

with respondent's requests. Pet. App. 44a (Posner, J., concurring). "It is highly unlikely that Congress intended for such a funding cut-off to be the response to such violations by a state." Pet. App. 31a.[4]

III. CERTIORARI SHOULD BE DENIED ON THE THIRD QUESTION PRESENTED BECAUSE THE DECISION BELOW REGARDING THE APPLICATION OF PAIMI TO PEER REVIEW RECORDS IS CORRECT AND CONSISTENT WITH PRIOR DECISIONS IN THE LOWER COURTS

1. The question of whether the right of Protection and Advocacy Systems under the PAIMI Act to "have access to all records" extends to peer review records has generated no conflict in the federal courts.

The court below joined the four other federal courts of appeals to hold that Protection and Advocacy Systems' right to access records encompasses peer review records. *See Protection & Advocacy for Persons with Disabilities v. Mental Health & Addiction Servs.*, 448 F.3d 119 (2d Cir. 2006) (Sotomayor, J.); *Missouri Prot. & Advocacy Servs. v. Missouri Dep't of Mental Health*, 447 F.3d 1021 (8th Cir. 2006); *Center*

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[4] In addition, respondent argued that this suit could proceed under 42 U.S.C. § 1983 if brought by an official of respondent in his official capacity, and that it could be brought to enforce the Supremacy Clause under *Ex parte Young*. Pet. App. 31a. Those would remain alternative grounds for affirmance even if there was no cause of action directly under the PAIMI Act.

for Legal Advocacy v. Hammons, 323 F.3d 1262 (10th Cir. 2003); *Pennsylvania Prot. & Advocacy, Inc. v. Houstoun*, 228 F.3d 423 (3d Cir. 2000) (Alito, J.).

Petitioners argue (Pet. 27-28) that all these decisions conflict with an earlier decision of the New Hampshire Supreme Court. *See Disabilities Rights Ctr., Inc. v. Commissioner*, 732 A.2d 1021 (N.H. 1999).

As the Second Circuit pointed out, *see Protection & Advocacy*, 448 F.3d at 126, the New Hampshire court did not address the relevant statutory language. Instead, it focused on a federal HHS regulation stating that the access right was not intended to preempt state laws preventing access to peer review records. Unlike the federal courts of appeals, the state court did not consider whether that regulation could be reconciled with the language of the PAIMI Act itself, apparently because that argument was not raised. *See Disabilities Rights Ctr.*, 732 A.2d at 1023-1024.

The federal courts of appeals deciding this question have all subsequently concluded that the regulation was inconsistent with the statute. And HHS is currently considering regulatory revisions that would eliminate the provision relied on by the state court. *See* 73 Fed. Reg. 19,708, 19,708-19,709, 19,716, 19,731-19,732 (2008). This event further suggests that any disagreement with the state court is of no continuing significance.

2. The federal courts of appeals have correctly interpreted the statute. Section 105 of PAIMI mandates

that respondent shall "have access to *all* records of * * * any individual." 42 U.S.C. § 10805(a)(4) (emphasis added). Section 106 of PAIMI defines the term "records" to include "reports prepared by any staff of a facility rendering care and treatment or reports prepared by an agency charged with investigating reports of incidents of abuse, neglect, and injury * * * describ[ing] incidents of abuse, neglect, and injury * * * and the steps taken to investigate such incidents." *Id.* § 10806(b)(3).

Section 106 of PAIMI also emphasizes that this access right applies notwithstanding "the laws of a State" that would "prohibit an eligible system from obtaining access to the records of individuals with mental illness in accordance with section 10805(a)(4) of this title and this section." *Id.* § 10806(b)(2)(C). Thus, the plain language of PAIMI gives Protection and Advocacy Systems such as respondent the right to "all" reports created by hospital committees evaluating the treatment of their patients.

3. Petitioners seek to evade the plain language (Pet. 27) by recourse to legislative history from a 1991 committee report. But the provisions governing records were enacted in 1986 and 1988. *See* PAIMI Act, Pub. L. No. 99-319, §§ 105, 106, 100 Stat. 478, 480 (1986) (initial enactment of statute); PAIMI Amendments Act of 1988, Pub. L. No. 100-509, § 6(b), 102 Stat. 2543, 2544 (1988) (adding definition of "records"). None of the language was amended in 1991. A committee report describing what an earlier Congress did is entitled to virtually no weight. *See*

Doe v. Chao, 540 U.S. 614, 626-627 (2004). As the Third Circuit said in *Pennsylvania Protection & Advocacy*, if Congress wanted to exclude state peer review records, "it needed to enact different statutory language. It could not achieve that result, in the face of the statutory language it enacted, simply by inserting a passage in a committee report" after the fact. 228 F.3d at 428.

Petitioners fare no better with their claim (Pet. 30) that the statute should be read to implicitly exclude peer review records on public policy grounds. Privileges that protect relevant evidence from discovery are disfavored. *See University of Pennsylvania v. EEOC*, 493 U.S. 182, 188-195 (1990) (refusing to recognize academic peer review privilege). Federal courts have refused to recognize a federal medical peer review evidentiary privilege, even when such records would be privileged in state courts under state law. *See, e.g.*, *Adkins v. Christie*, 488 F.3d 1324 (11th Cir. 2007), cert. denied, 552 U.S. 1131 (2008); *Virmani v. Novant Health Inc.*, 259 F.3d 284 (4th Cir. 2001); *Memorial Hosp. v. Shadur*, 664 F.2d 1058 (7th Cir. 1981) (per curiam). The decision below, which permits Protection and Advocacy Systems access to peer review documents in order to protect persons in state-run institutions from abuse and neglect, is consistent with public policy as reflected in this unbroken line of decisions.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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